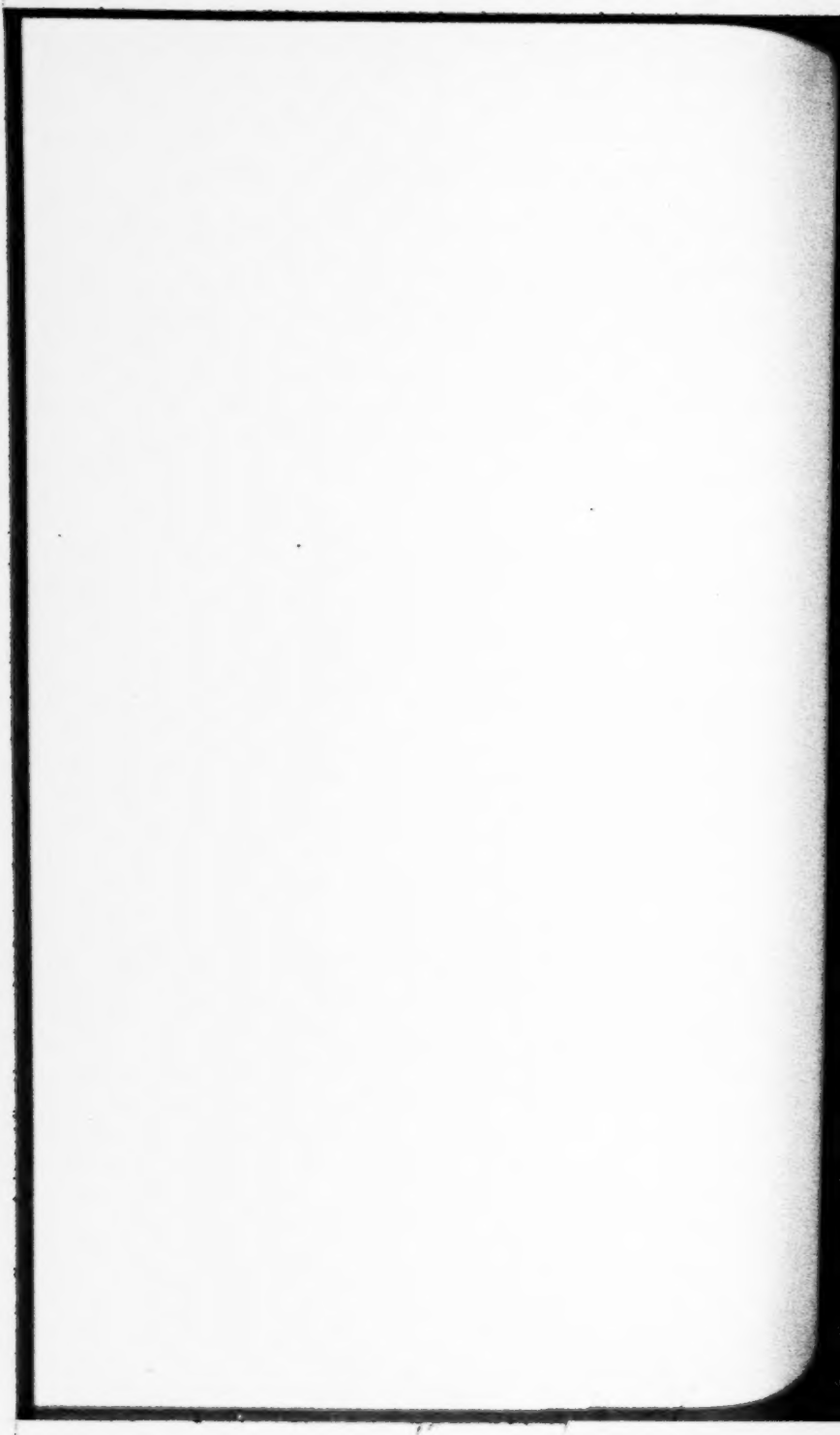

INDEX

Opinions Below 3

Counterstatement of the Question Presented 3

Counterstatement of the Case 3

1. United States v. Bethlehem Steel Corporation 4

2. The Instant Case 6

Summary of Argument 9

Argument 10

I. There Is No Basis for Asserting Res Judicata or Collateral Estoppel 10

II. Stare Decisis Does Not Apply 15

III. The National Policy Against Racial Discrimination Precludes Giving Bethlehem a License to Discriminate 16

IV. The Issues Raised by Bethlehem Are Not Substantial Enough to Merit Supreme Court Review 21

V. The Supreme Court Review at This Interlocutory Stage Is Inappropriate 21

Conclusion 22

Citations

CASES

Amalgamated Meat Cutters v. *NLRB*, 352 U.S. 153 (1956) 10

Dobbins v. *Local 212, IBEW*, 292 F.Supp. 413 (S.D. Ohio 1968) 12

EEOC v. *Cement Masons, Local 770*, ... F.Supp. ....., 1 FEP Cases 189 (S.D. N.Y. 1967) 18

Griggs v. *Duke Power Co.*, 404 U.S. 424 (1971) 7, 12

Hartford Accident & Indemnity Co. v. *Jasper*, 144 F.2d 266, 267 (9th Cir. 1944) 10
Heckman v. *United States*, 224 U.S. 413 (1912) 14
Hicks v. *Crown Zellerbach Corp.*, 293 F.Supp. 104 (E.D. La. 1968) 13
Hicks v. *Crown Zellerbach Corp.*, ... F.Supp. ....., 1 FEP Cases 577 (E.D. La. 1968) 13
Kersh Lake Drainage District v. *Johnson*, 390 U.S. 485 (1940) 13
Local 189, UPP v. *United States*, 416 F.2d 980 (5th Cir. 1969) 7
Miller v. *International Paper*, 408 F.2d 283 (5th Cir. 1969) 15
NLRB v. *Lannon Manufacturing Co.*, 226 F.2d 194, 199 (6th Cir. 1955) 10
Newman v. *Piggie Park Enterprises*, 390 U.S. 400, 88 S.Ct. 964 (1968) 17
O'Donoghue v. *United States*, 289 U.S. 516, 550 (1933) .. 15
Spell v. *Theatrical Local 77*, ... F.Supp. ....., 1 FEP Cases 851 (D. N.J. 1969) 18
Trbovich v. *United Mine Workers*, 404 U.S. 528, 538-39 (1972) 10
Udall v. *Tallman*, 380 U.S. 1, 85 S.Ct. 792 (1965) 12
United States v. *Bethlehem Steel Corp.*, 446 F.2d 452 (2d Cir. 1971) 5, 7, 20
United States v. *Bethlehem Steel Corp.*, 312 F.Supp. 977 (W.D. N.Y. 1970) 5, 19
United States v. *Hayes International Corp.*, 456 F.2d 112, 118-19 (5th Cir. 1972) 7
United States v. *Jacksonville Terminal*, 451 F.2d 418 (5th Cir. 1971) 7
United States v. *Operating Engineers, Local 3*, ... F. Supp. ....., 4 FEP Cases 1088 (N.D. Cal. 1972) 11, 12, 20

United States v. *Papermakers, Local 189*, 301 F.Supp. 906 (E.D. La. 1969) 13
Vogler v. *McCarty*, 294 F.Supp. 368 (E.D. La. 1967) 12
Young v. *ITT*, 438 F.2d 757 (3d Cir. 1971) 17

STATUTES

Civil Rights Act of 1964, Title VII—
Section 706 ..... 1, 7
Section 707 ..... 2, 3, 4
29 U.S.C. §216(c)—
Fair Labor Standard Act 11
Civil Rights Act of 1964, Title VII, as amended by Equal Employment Opportunity Act of 1972—
Section 706(b) 18
Section 706(f)(1) 18

MISCELLANEOUS

G. Sape and T. Hart, Title VII Reconsidered, Equal Employment Opportunity Act of 1972, 40 G.W.U. Law Rev. 824 (1972) 19
118 Cong. Rec. S.1526 19
118 Cong. Rec. S.1797 19

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 1004

BETHLEHEM STEEL CORPORATION,
Petitioner,

vs.

GEORGE H. WILLIAMSON, JR., TIMOTHY SMITH, JAMES B. LINDSAY, EDWARD GREEN, JR., WILLIAM A. CLARK, and VELVET BROWN, JR.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Bethlehem Steel Corporation has filed a petition for a writ of certiorari with this Court seeking to overturn a decision of the Court of Appeals for the Second Circuit in which the appellate court held that private citizens filing suit under Section 706 of Title VII of the Civil Rights Act of 1964 are entitled to seek and obtain fair and adequate relief from racially discriminatory employment practices. Inasmuch as the existence of the

UND CLOSE IN CENTER

unlawful practices and their discriminatory consequences are not disputed, the sole reason offered by Bethelehem for denying these employees the ordinary protection of the law is that prior to the instant litigation the Attorney General acting under the provisions of Section 707 of Title VII sought and obtained limited relief with respect to certain discriminatory employment practices other than those which are currently depriving Respondents and the class they represent of equal employment opportunity. Respondents respectfully urge the Court to deny the petition for the following reasons:

(1) Because the decision of the Court below—that private parties are not deprived of their right to be free from racial discrimination in employment because the Attorney General in prior litigation against their employer (to which they were not a party) did not seek relief against the practices which are currently victimizing them—is clearly correct as a matter of law and policy;

(2) Because the issues raised by petitioner are so insubstantial and so peculiar to the instant case as not to merit Supreme Court review; and

(3) Because review of this case in an interlocutory stage is not warranted.

Indeed, when the correctness of the decision below, the insubstantiality of petitioner's arguments, and the inappropriateness of this case for Supreme Court review are considered, we believe that the true purpose of this petition becomes clear: petitioner, which obtained a stay of the mandate of the court below pending decision of this petition, seeks to delay, as long as possible, the day when it will be forced to cease its discriminatory policies and obey the laws against racial discrimination in employment.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 468 F.2d 1201 (2d Cir. 1972) and the opinion of the District Court is reported in 5 FEP Cases 202 (W.D. N.Y. 1972). These opinions, as well as the opinions of the district court and the Court of Appeals in *United States* v. *Bethlehem Steel Corporation*, are accurately reproduced in the appendix to the petition.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Where pursuant to Section 707 of Title VII of the Civil Rights Act of 1964 the Attorney General of the United States brings a suit with limited objectives, seeking and obtaining limited relief, but leaving other serious unlawful employment practices intact, does the discriminator, Bethlehem Steel Corporation, thereby obtain an unassailable license to continue to engage in those unlawful practices with respect to which the Attorney General neither sought nor obtained relief.

COUNTERSTATEMENT OF THE CASE

The petition for certiorari seeks review of an order of the Court of Appeals remanding this case to the district court for a hearing in order to fashion "full, fair, just and adequate relief" (slip opinion at 327) from the discriminatory system of recall from layoff. Nowhere in its petition does Bethlehem deny that its system of recall from layoff operates to discriminate against blacks; rather it seeks to assert that because of prior litigation by the Department of Justice—to which respondents and the class they represent were not a party—the Company has obtained an irrevocable license to continue these discrim-

inatory practices. In order to fully appreciate the nature of Bethlehem's position in this case, a brief review of the prior litigation in both *United States* v. *Bethlehem* and the instant case is necessary.

1. United States v. Bethlehem Steel Corporation

In December of 1967, the Attorney General brought suit pursuant to Section 707 of the Civil Rights Act of 1964 (42 U.S.C. §2000e-6) alleging that Bethlehem Steel discriminated against blacks by assigning them to the hottest, dirtiest, and lowest paying jobs in the plant and challenging the transfer provisions of its collective bargaining agreement on the grounds that these provisions locked black employees into the discriminatory assignments. As petitioner concedes on page 8 of its petition, no allegation was made in the Government complaint that the system of recall was discriminatory.

Shortly after the litigation was commenced, Bethlehem Steel entered into a stipulation with the Government admitting that Bethlehem had assigned blacks to the worst jobs (in part because Bethlehem officials believed that blacks could stand the heat better); that Bethlehem officials had deliberately raised the test scores of white job applicants to give them priority over blacks; and that generally the Company had followed a practice of excluding blacks from all but eleven of the plant's eighty-two departments.

Prior to the suit, the Company agreed to stop assigning job applicants on the basis of race, to stop falsifying test scores, and *in the future* to cease the other discriminatory assignment practices which it had used to effectively segregate its plant. It refused, however, to provide relief to the victims of its past practices and indeed disputed the Government's contention that the transfer system which in operation required employees to forfeit their

competitive seniority and rate of pay if they transferred was unlawful. The impact of Bethlehem's position was to place a penalty on incumbent black workers who had been assigned to the eleven least desirable, lowest paying departments, should these workers desire to transfer. Thus, these workers were frozen into the discriminatory assignment patterns of the past. The Government, accordingly, sought in the district court a remedy which would permit black employees originally assigned because of their race to transfer to the departments which had been closed to them in the past, and allowed the employee to retain his plant seniority (years of plant service) and rate of pay when he transferred. Although the district court found that the transfer system did have the effect of locking blacks into the departments to which they were discriminatorily assigned, it declined to grant the relief because of a variety of "collateral effects" of the Government's requested relief.[1]

The Government appealed from the failure of the district court to grant the seniority carryover and rate retention remedies it had requested. On appeal, the Court of Appeals for the Second Circuit reversed the District Court's failure to grant this relief holding that the transfer provisions of the collective bargaining agreement had the present effect of discriminating against blacks by locking them into discriminatory assignments and that "the business necessity doctrine does not require denial of the proposed relief." *United States* v. *Bethlehem Steel Corporation*, 446 F.2d 652, 664 (2d Cir. 1971). Accordingly,

---

1. These "collateral effects" included the fact (1) that the remedy was afforded only to blacks who had been discriminatorily assigned to a department and not to other ethnic minorities; (2) that rate retention would result in differing rates of pay for doing the same job; and (3) seniority carryover would disrupt existing seniority expectations of white workers. *United States* v. *Bethlehem Steel Corp.*, 312 F.Supp. 977, 994-95 (W.D. N.Y. 1970). The effect of the remedy on the system of recall from layoff was nowhere mentioned.

the Court of Appeals ordered that the relief requested by the Government be implemented. In accordance with "the carefully limited order *suggested by the Government*," these transfer rights were restricted to "*vacancies occurring in the normal course of business, i.e., vacancies caused by the death, retirement or transfer of an incumbent or by creation of a new job.*" id. at 663, 664 (emphasis added). And, "*as the Government suggests,* as workers are recalled following a layoff, all employees should assume the same positions relative to each other as they held immediately prior to layoff." id. at 664 (emphasis added).

Thus, the Court of Appeals ordered precisely the remedy requested by the Government.

2. The Instant Case

At about the same time that the Attorney General filed complaint Bethlehem entered a period of declining demand for employees. Substantial layoffs of long duration occurred affecting 50% of Bethlehem's workforce.[2] In mid-1971, however, a rising demand resulted in employees being recalled from layoff. Accordingly, the black workers of Bethlehem, frustrated by the failure of years of Government litigation to bring about any meaningful changes in their situation, brought the instant suit. They also sought preliminary relief respecting the recall from layoff system being used by Bethlehem and the unions.

---

2. The impact of this economic fact on the Attorney General's decision to limit transfer rights to permanent vacancies was to deny the black workers of a meaningful remedy. The likelihood of a vacancy arising due to death, retirement or transfer when such a large portion of the workforce was on layoff was extremely low, since *all* laid off workers would have to be recalled before such a vacancy would exist. Thus, years of litigation netted the black worker virtually nothing in terms of improved opportunity. Moreover, Bethlehem's force reduction may itself be "permanent" thereby effectively foreclosing any meaningful right of transfer in the future, locking about 1400 black employees into the dirty, hot, low paying jobs they were originally assigned because black skin can "stand the heat better."

For the Company and the unions were unswerving in their determination to keep blacks in black jobs and whites in white jobs and were, therefore, returning workers from layoff based on their *departmental assignment at the time of layoff*. In short, in 1971 the Company and the unions were engaged in re-segregating the plant. The relief sought by plaintiffs was simple and fair requesting only that persons on layoff be returned from layoff to entry level and labor pool jobs which they were qualified to perform on a non-discriminatory basis.

The jurisdiction of the court was invoked pursuant to Section 706 of Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866 (42 U.S.C. §1981). The legal basis for relief asserted by plaintiffs—that it is unlawful to perpetuate in the present the effects of past discrimination—is one that is now universally accepted. *Griggs* v. *Duke Power Co.*, 404 U.S. 424 (1971); *U. S.* v. *Jacksonville Terminal*, 451 F.2d 418 (5th Cir. 1971); *U. S.* v. *Bethlehem Steel Corp.*, 446 F.2d 452 (2d Cir. 1971); *Local 189, UPP* v. *United States*, 416 F.2d 980 (5th Cir. 1969). That a system of recall from layoff which preserves discriminatory assignments is unlawful was specifically held by the court below and by the Fifth Circuit. *Williamson* v. *Bethlehem Steel Corp.*, slip opinion at 326; *United States* v. *Hayes International Corp.*, 456 F.2d 112, 118-19 (5th Cir. 1972). In its petition for certiorari, Bethlehem does not challenge the soundness of legal basis on which plaintiffs rest their claim. Nor does Bethlehem dispute in its petition that its system of recall from layoff does, in fact, return black workers to the same hot, dirty and low paying jobs to which the company discriminatorily assigned them. Indeed, Bethlehem cannot dispute this fact, for the recall system is designed to do just that.

Since the requisite factual bases for a finding of past discrimination coupled with present discriminatory effect

are not disputed, and the legal principle requiring relief from such discrimination is well established, it is clear that Bethlehem has nothing to bring to this Court. But determined to continue its unlawful practices until compelled by court order to abandon them, Bethlehem with great solemnity (and even greater hypocrisy); praising the virtues of repose and mouthing the slogans of *res judicata, stare decisis* and collateral estoppel; noting the company's deep (albeit purely philosophical) concern with the effective enforcement of Title VII; urges this Court to give serious consideration to the proposition that the Attorney General of the United States has vested in the Bethlehem Steel Corporation an irrevocable license indefinitely to discriminate against its black employees. It is to this preposterous suggestion that Respondents are compelled to address themselves. We do so noting that the Court of Appeals for the Second Circuit was clearly correct when it rejected as absurd the "policy" arguments made by Petitioner and gave short shrift to the legal slogans offered in support of a judicial ruling in favor of a policy encouraging racial discrimination. That Court held that since Plaintiffs in the district court were neither parties to the Justice Department suit nor in privity with the Justice Department, they could not be bound as a matter of *res judicata* or collateral estoppel by the decision in *United States* v. *Bethlehem;* the Second Circuit also held that since "the Government did not seek relief in the case of recall after layoff . . . the earlier decision [does not] bind us on the basis of *stare decisis.*" It remanded the case to the district court to fashion "full, fair, just and adequate relief."

Bethlehem sought and was denied rehearing and rehearing *en banc* by the Second Circuit. It did, however, obtain a stay of the mandate of the Second Circuit pending decision of this petition. Thus, a hearing on the ap-

COPY BOUND CLO

propriate relief to be granted and implementation of such relief awaits the disposition of this petition.

SUMMARY OF ARGUMENT

Bethlehem asserts three grounds which it claims are adequate to justify Supreme Court review. First, it claims that general policy considerations in favor of finality dictate that it obtained irrevocable sanction for its discriminatory practices. Second, it claims that *res judicata* and/or collateral estoppel preclude its discriminatory practices from being challenged by Respondents. Third, it argues that (apparently on the basis of *stare decisis*) that no relief against its discriminatory practices other than that requested and obtained by the Attorney General may be had. We show below that these arguments are wholly without merit. The *res judicata* and collateral estoppel arguments fail because private parties are not in privity with the Attorney General; petitioner's position has been rejected not only by the Court below and a district court in California, but also by the Attorney General and the EEOC. The *stare decisis* argument fails because, as the Court below held, the relief sought in the instant case was not an issue in *U. S.* v. *Bethlehem*. Other than the *res judicata* and *stare decisis* arguments there is no legal theory supporting finality Bethlehem's "policy" argument in favor of giving it a license to discriminate; to do so would be at odds with the national policy against racial discrimination. Moreover, this case involves interpretation of a statute which was amended subsequent to the bringing of this case and therefore the case is not of sufficiently general applicability to merit Supreme Court review. Finally, there is simply no reason for the Supreme Court to reach out for the issues raised at this interlocutory stage.

OSE IN CENTER

ARGUMENT

I.

There Is No Basis for Asserting Res Judicata or Collateral Estoppel.

The Court of Appeals in the instant case made short shrift of Petitioner's contention that *res judicata* or collateral estoppel were applicable to the present case:

> "For purposes of res judicata or collateral estoppel, the private citizens in this case are not bound by the Attorney General's action in the former case since they neither were parties to it, *NLRB* v. *Lannon Manufacturing Co.*, 226 F.2d 194, 199 (6th Cir. 1955), *rev'd on other grounds sub nom. Amalgamated Meat Cutters* v. *NLRB*, 352 U.S. 153 (1956), nor have interests such as to be in privity with the Attorney General. Cf. *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538-39 (1972) (intervention by union members permitted in Labor-Management Reporting and Disclosure Act litigation brought by the Secretary of Labor). Therefore, the judgment in the previous case does not have conclusive force here. See Restatement of Judgments §93 et seq. (1942); 1B J. Moore, Federal Practice ¶0.411[1] (2d ed. 1965). See also *Hartford Accident & Indemnity Co.* v. *Jasper*, 144 F.2d 266, 267 (9th Cir. 1944). (Slip opinion at 323)."

This Court should also summarily reject Bethlehem's contention. Under Title VII as originally enacted,[3] the

---

3. Title VII was amended by the Equal Opportunity Act of 1972. The suit by the Attorney General and the instant action were brought under the old statute prior to its amendments. No argument is asserted that these new amendments govern the instant case. Petitioner's reference to them is apparently only as evidence of legislative intent under the old law.

United States was charged with eliminating gross violations of Title VII ("pattern[s] or practice[s] of resistance to the full enjoyment of any of the rights secured by this title. . . ." 42 U.S.C. §2000e-6). The aggrieved person was provided with an individual right of action to secure redress for personal injury. 42 U.S.C. §2000e-5(e). The prerequisites for this action included the submission of a charge of discrimination to EEOC and the issuance of a right to sue letter. Nothing in the Act suggested that the individual's private right under Section 706 was in any way contingent on action taken or not taken by the Attorney General. Thus, Congress did not create a representative relationship between the Attorney General and private parties.[4] Rather, Congress recognized the individual law suit was the primary means of enforcing individual rights.[5]

The conclusion that the Attorney General, under Section 707, does not represent private parties has been specifically approved by the Attorney General, the EEOC, and United States District Court for the Northern District of California, as well as the Second Circuit in the instant case. In *United States* v. *Operating Engineers Local 3*, ... F.Supp. ....., 4 FEP Cases 1088 (N.D. Cal. 1972), the Court ruled that where parallel actions by the Attorney General and private parties were proceeding, that the entry into a consent decree by the United States did not bar additional relief for the same violation being granted to the private party and stated that:

---

4. Compare the Fair Labor Standard Act, 29 U.S.C. §216(c) which provides that the Secretary of Labor sues to collect wages "on behalf of an employee".

5. Congress recognized that both public and private interests might exist in the same situation, and provided that in such cases, where the Attorney General "certifies that the case is general public importance", he might intervene to represent the public interest. 42 U.S.C. §2000e-5(e). The provisions for intervention do not oust the private litigant nor do they diminish his role as the primary source of judicial enforcement of the Act.

> "Congress provided for both private and public actions under Title VII; and given that the possibility of the two proceedings at the same time would have occurred to the drafters of Title VII, it is only reasonable to expect Congress to have prohibited such simultaneous proceedings if it wanted to." 4 FEP Cases at 1093.

In *Operating Engineers*, the United States filed a brief in which it took the position that it was not the representative of the private parties (see 4 FEP Cases at 1093); in the instant case the EEOC filed an amicus brief in the Court of Appeals in which it specifically rejected the notion that the Attorney General represented private parties under Title VII. These interpretations by both the Attorney General and the EEOC—the agencies charged with administration of these sections—are entitled to great weight. *Griggs* v. *Duke Powers, supra; Udall* v. *Tallman*, 380 U.S. 1, 85 S.Ct. 792 (1965). Moreover, there have been other cases where the private litigant and the Attorney General maintained simultaneous actions against the same defendant. See, e.g. *Vogler* v. *McCarty*, 294 F.Supp. 368 (E.D. La. 1967); *Dobbins* v. *Local 212, IBEW*, 292 F.Supp. 413 (S.D. Ohio 1968). There has never been a suggestion heretofore either that any action by the Attorney General controlled the rights of private parties seeking relief under Section 706, or that an action by the Attorney General precluded an action by the private litigant.

The litigation involving the practices of Crown Zellerbach and the United Papermakers Union is another instructive example of judicial sanction of multiple actions by private parties and the Attorney General. In this litigation, Crown Zellerbach and the United Papermakers Union were involved in litigation maintained by private litigants and the Attorney General, all involving the same basic issues of the defendants' discriminatory hiring, testing and senior-

ity practices,[6] and appropriate remedial orders were issued against the defendants in the private suit and in the suit brought by the Attorney General.

Against these authoritative interpretations of the statute on the precise point raised by petitioner, Bethlehem offers no comment. Rather, petitioner seeks help outside of the judicial interpretation of Title VII relying on two cases whose factual situations are so distinguishable from the instant case as to make them not even proximately relevant to the instant proceeding. In *Kersh Lake Drainage District* v. *Johnson*, 390 U.S. 485 (1940), one of the two authorities relied upon, the court ruled that certificate holders of a drainage district were bound by the result obtained by the Commissioners of a drainage district in litigation to collect drainage taxes. These Commissioners were specifically charged by the statute on which the certificates involved were drawn with "protecting and enforcing creditors rights on obligations issued by the District". 309 U.S. 490. It also held that the "Commissioners were comparable to corporate directors". id. at 490. It concluded that:

> "The very statutory plan from which the certificate obligations sprang contemplated that the Commissioners should represent the collective and corporate interests of the District in litigation between the District and the land owner involving matter personal to the land owner."

and that:

> "Certificate holders were not entitled to be made parties to these proceedings." id. at 491.

---

6. *Hicks* v. *Crown Zellerbach Corp.*, 293 F.Supp. 104 (E.D. La. 1968); *Hicks* v. *Crown Zellerbach Corp.*, ____ F.Supp. ____, 1 FEP Cases 577 (E.D. La. 1968); *U. S.* v. *Papermakers, Local 189*, 301 F.Supp. 906 (E.D. La. 1969).

The Court likened the certificate holders to bond holders. Surely private citizens under Title VII, who have the right to bring actions in their own name and to intervene in actions brought by the Attorney General, do not bear a relationship to the Attorney General that is in any way like that of stock holder to corporate director or bond holder to indentured trustee.

The second case on which Bethlehem relies, *Heckman* v. *United States*, 224 U.S. 413 (1912), is, if anything, even further from the point. In *Heckman*, suit was brought by the United States as representative of the Cherokee nation, considered wards of the United States in a state of tutelage. The case stated that members of the tribe, who had been deprived by act of Congress of the right to alienate their individual land holdings, were not necessary parties to a suit adjudicating their rights to the land because the United States represented them for these purposes. Bethlehem refuses to realize that the Thirteenth and Fourteenth Amendments to the United States Constitution preclude this Court from treating black citizens in the same manner as wards and conquered tribes in a state of "tutelage." That Bethlehem would offer this Court such an argument demonstrates the legal and moral bankruptcy of its position. Accordingly, we respectfully submit, that Bethlehem's assertion of privity between the Attorney General is utterly without foundation and, therefore, its argument that *res judicata* or collateral estoppel should apply is baseless.

Res judicata is also inapplicable for another reason. The Attorney General's suit under Section 707 is no way the identical cause of action as the instant suit brought under Section 706 and 42 U.S.C. §1981. The Attorney General's authority requires no charge by a private party and may be brought upon certification by the Attorney General that he has probable cause to believe that a pattern or

COPY BOUND

practice of discrimination exists. The instant case involves two separate causes of action, neither of which is the same as the pattern or practice suit under Section 707. To come into being a cause of action pursuant to Section 706 requires *inter alia*: (1) a violation of Section 703 or 704 of Title VII; (2) formal charges first, to the state fair employment authorities and then to EEOC; (3) the issuance of a suit letter by the EEOC; and (4) the bringing of suit pursuant to that letter within thirty days of its issuance. See *Miller* v. *International Paper*, 408 F.2d 283 (5th Cir. 1969). Thus, the cause of action under Section 706 is quite different from one brought under Section 707. Similarly, a cause of action under 42 U.S.C. §1981—which assures blacks the same right to make contracts as is enjoyed by white citizens—is totally distinct from a Section 707 action. In addition, as we have shown, the issue of recall from layoff was never litigated; therefore, collateral estoppel cannot apply.

II.

Stare Decisis Does Not Apply.

Bethlehem also argues that because Respondents relied on the record in *United States* v. *Bethlehem* to establish past discrimination, they are as a matter of law limited to the relief sought and obtained by the Attorney General. We take this argument to assert only that Bethlehem contends that the decision in *U. S.* v. *Bethlehem* is a binding precedent against granting relief in any way different from that sought by Attorney General i.e., that Bethlehem relies on the doctrine of *stare decisis;* to give its argument any greater breadth would be to give the prior action *res judicata* effect—and that argument has been dealt with above.

For *stare decisis* to apply, the precise issue must have been actually decided by a court as the result of an adversarial dispute. *O'Donoghue* v. *United States*, 289 U.S. 516, 550 (1933). It is clear from a review of the district

LOSE IN CENTER

court opinion that the issue of recall was never before the court and that that court never decided anything with respect to that issue. (See footnote 1 *supra*). And, the Court of Appeals in *U. S.* v. *Bethlehem* "touched upon" the issue of recall from layoff "only to clarify that it was an issue which was not decided in that case". *Williamson* v. *Bethlehem*, slip opinion at 321. Since neither court ever passed upon the legality of Bethlehem's system of recall, the doctrine of *stare decisis* cannot apply. Indeed, at pages 19-20 of its petition, Bethlehem concedes as much, for it admits that in its reply brief the United States removed any consideration of the issue from the court.[7]

III.

The National Policy Against Racial Discrimination Precludes Giving Bethlehem a License to Discriminate.

The first reason that Bethlehem asserts a writ should be granted is because the failure to allow the Attorney General to preclude subsequent actions by private parties will have an adverse impact on the enforcement of Title VII. We have saved consideration of this point until after the discussion of the *res judicata* and *stare decisis* points because discussion of these points, we believe, makes it clear that this "policy" argument on the part of Bethlehem has no legal basis apart from *res judicata*, collateral es-

---

7. Bethlehem misrepresents to this Court that the Government requested any modification of the recall from layoff system. In the Court below, respondents set forth an exhaustive review of the papers in *U. S.* v. *Bethlehem* including the original relief sought by the United States in its proposed decree before the district court, the notice of appeal, the briefs of the parties and a letter from the Assistant Attorney General for the Civil Rights Division stating that respondents were seeking "relief which the government did not request". The Second Circuit interpreting the opinion of a panel of its own judges concluded that "the Government expressly did not seek the relief." *Williamson*, slip opinion at 322. We submit that there is no reason for the Supreme Court to review this finding of fact.

toppel and *stare decisis*. As we showed above, in our discussion of the relevant statutory language, there is simply no support for Bethlehem's assertion that anything in Title VII would give the conclusive effect it suggests to an action brought by an Attorney General under Title VII. Accordingly, we submit that its policy arguments are better addressed to the legislature which enacted the statutory scheme than to the Supreme Court.

However, in view of the possibility that this Court has these arguments before it, we wish to note our total disagreement with them. Manifestly, the national policy against racial discrimination—which this Court has stated to be a policy "of the highest priority", *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 88 S.Ct. 964 (1968)—far outweighs any of the interest in finality asserted by petitioner, particularly when what Petitioner seeks is final judicial approval of a policy of racial discrimination.

Congress, the Courts and the Executive intended that a broad range of parallel and overlapping remedies for racial discrimination in employment be available. See, *Young* v. *ITT*, 438 F.2d 757 (3d Cir. 1971). The statutory remedies for employment discrimination include the Civil Rights Act of 1886 (42 U.S.C. §1981—one of the provisions under which this action is brought); the Civil Rights Act of 1871 (42 U.S.C. §1983—which applies to employment discrimination involving state action); a private action under Section 706 of Title VII; an enforcement action by the Equal Employment Opportunity Commission under Section 706 of Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972; and a pattern and practice suit under Title VII. The President has issued a series of executive orders dating back to 1941 forbidding racial discrimination by gov-

LOSE IN CENTER

ernment contractors. The latest major revision of these executive orders, E.O. 11246, created an Office of Federal Contract Compliance which administers a broad-ranging system to regulate the employment practices of employers with whom the government contracts. Moreover, certain regulatory agencies have recognized their responsibility not to sanction or support racial discrimination in the industries they regulate and began proceedings against these industries. See e.g., In the Matter of In Re Petitions filed by EEOC, FCC, Docket No. 19143 (Proceedings against AT&T).

In addition, many states have remedies for racial discrimination which under Section 706 must be resorted to prior to invoking federal jurisdiction. In no case is resort to the state remedy a bar to a separate federal action. See *EEOC* v. *Cement Masons, Local 770,* ..... F. Supp. ....., 1 FEP Cases 189 (S.D. N.Y. 1967); *Spell* v. *Theatrical Local 77,* ..... F.Supp. ....., 1 FEP Cases 851 (D. N.J. 1969).[8]

Bethlehem's other attempts at manufacturing a legislative intent which supports its novel theories are not surprisingly unsupported by any citation to the legislative history of the 1972 amendments. We see no point in reciting all the legislative history omitted by petitioner. We would

---

8. Petitioners' contention that the 1972 amendment to Section 706(b) which provides that in *investigating* a charge, *the EEOC* "shall accord substantial weight to final findings and orders" of state and local authorities evidences a congressional policy against multiple suits is clearly wrong. First of all, this provision only requires that substantial weight, not binding effect, be given to orders of state authorities. Thus, Congress refused to allow these authorities the power which they contend this Court should manufacture for the Attorney General. Second, the provision quoted provides only to EEOC. Thus, even if EEOC gave binding effect to a state authority and therefore dismissed a charge, the employee, under Section 706(f) (1), would have the right to bring an action in federal court.

point out, however, that as the court below indicated, Congress in passing the 1972 amendments was careful to preserve the private right of action. It did this in a number of ways. First, although it gave the EEOC new power to enforce the act by federal court suit based directly on a private charge, it provided for intervention rights in that suit. Second, it provided that if EEOC determined to settle a case prior to suit by means of conciliation, the charging party could still sue on his charge unless he agreed to the conciliation agreement.

> if . . . the Commission has not entered into a conciliation agreement *to which the person aggrieved is a party* . . . a civil action may be brought . . . by the person claiming to be aggrieved. Section 706(f)(1).

Third, during the passage of the 1972 Act, attempts to repeal provisions of the 1866 Civil Rights Act were defeated. See 118 Cong. Rec. S.1526 (Daily Edition February 9, 1972); 118 Cong. Rec. S.1797 (Daily Edition February 15, 1972). And the Senate Committee made it clear that neither the "provisions regarding the individual's right to sue under Title VII nor any of the provisions of this bill are meant to affect existing rights granted under other laws" S. Rep. No. 415 at 24. See generally, G. Sape and T. Hart; *Title VII Reconsidered—The Equal Employment Opportunity Act of 1972*, 40 G.W.U. Law Rev. 824, 884-888 (1972).

Finally, we note that Bethlehem's argument that failure to accord finality to agreements reached between the Attorney General and discriminators will discourage voluntary compliance by those discriminators is pure sophistry. Bethlehem's notion of "voluntary compliance" is well illustrated by its conduct in the present case. After stipulating to practices which the district court held created "a sorry image", 312 F.Supp. at 979, Bethlehem spent almost

four years litigating with the government over appropriate relief. By and large the "cooperation" of Bethlehem with the government consisted of entering into a stipulation of facts which the government would have had no difficulty proving, and agreeing to stop some of the more blatant practices of discriminatory assignment, like falsifying test scores. Moreover, even after a judicial determination that its seniority and transfer provisions at Lackawanna were unlawful, Bethlehem continued these very practices at its Sparrows Point, Maryland plant, even though the Second Circuit in *U. S.* v. *Bethlehem* noted that the Sparrows Point situation was identical to that at Lackawanna and, therefore, equally unlawful. See *U. S.* v. *Bethlehem*, 446 F.2d at 664-65. Moreover, on January 15, 1973, the Secretary of Labor issued an order which paralleled that rendered by the Second Circuit in *U. S.* v. *Bethlehem* over a year and a half before. This marked the first time the Secretary acting pursuant to E.O. 11246 had ever ordered such relief.

Rather than rely on Bethlehem's arguments concerning effective enforcement of Title VII, we submit that this court should look to the position of the EEOC and the Attorney General as well as the Court below. Unlike Bethlehem these institutions do not find their interpretation of the law hampered by a desire to continue unlawful employment practices. In the court below, the EEOC filed an *amicus* brief in which it argued against finality and stated that "the amended Acts made it clear, however, that the government is still not to have the last word in the attack on employment discrimination." Similarly, the United States in *U. S.* v. *Operating Engineers, supra*, filed a brief in which it supported the right of private parties to obtain relief beyond that which the United States had obtained pursuant to a consent decree. In that case, the Court rejected finality of such decrees.

IV.

The Issues Raised by Bethlehem Are Not Substantial Enough to Merit Supreme Court Review.

From this review of the points raised by Bethlehem in favor of granting its petition, we submit that it is clear that the issues are not of a character which would justify Supreme Court review. None of the arguments raised by Bethlehem indicate any conflict among the circuits on any of the issues raised. Moreover, its attempt to find a conflict on the *res judicata* questions between decisions of this court and the decision of the Second Circuit are clearly baseless. Nor are the issues raised of such general applicability or importance as to justify Supreme Court review. They apply only to suits brought by the Attorney General whose power to bring pattern and practice suits expires in 1974. Any consideration of the effect of EEOC enforcement on a private right of action should await a case where that factual issue has been raised. The arguments in favor of finality on the basis of *res judicata*, collateral estoppel and policy, are so insubstantial on their face as to not merit review. The *stare decisis* argument, which involves the interpretation by the Second Circuit of its own opinion and decree hardly merits review by this court, especially when it is considered that none of the judges who rendered the original decree in *U. S.* v. *Bethlehem* were willing to even request a vote on Bethlehem's request for rehearing *en banc*.

V.

The Supreme Court Review at This Interlocutory Stage Is Inappropriate.

In its petition Bethlehem asks this Court to reach out for the issues it presents, even though all that the Second Circuit has done is to remand the case to the district court

LOSE IN CENTER

for a hearing on the appropriate relief. Until such relief is ordered by the district court, there is no guarantee that relief "inconsistent" with the relief granted in *United States* v. *Bethlehem* will, in fact, be granted. Bethlehem offers no adequate reason why this Court should adjudicate an issue which it may never be necessary for it to do.

CONCLUSION

For all of the foregoing reasons, Bethlehem's petition for writ of certiorari should be denied. Because Bethlehem has obtained a stay of the mandate of the Court below pending disposition of the petition, we respectfully urge that this disposition be expedited.

Respectfully submitted,

SPECTER & SPIEGELMAN

By: Russell Specter

RUSSELL SPECTER
PAUL J. SPIEGELMAN
Post Office Box 4887
Washington, D. C. 20008

LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES

RICHARD LIPSITZ AND CARMIN R. PUTRINO
One Niagara Square
Buffalo, New York 14202
Attorneys for Respondents

CLOSE IN CENTER